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No. 88-1829

In The

Supreme Court of the United States

October Term, 1988

JULIUS E. CRUSE,

Petitioner,

vs.

FAYETTE COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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RESPONSE TO QUESTIONS PRESENTED

1.

Whether a rural property owner who was never permitted a permit for the overnight parking of recreational vehicles or any other operation of a mobile home park and which has been found to be an illegal non-conforming use may now challenge the decision of the Board of Commissioners of Fayette County, Georgia made in 1986 at which he was present and represented by counsel but did not file an appeal listed in the requirements of Georgia law.

2.

Whether the decision of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S. Ct. 52, 2378 (1987) would apply where a property owner is not denied the total use of his property by a zoning regulation enacted by the Board of Commissioners of Fayette County, Georgia.

PARTIES TO THE PROCEEDING

Respondent agrees to the names of the parties to the proceeding but denies any allegations of damages and punitive damages for a constitutional tort pursuant to 42 U.S.C. 1983 for the unlawful taking of property, under code of law.

TABLE OF CONTENTS

Page

Response to Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Brief in Opposition to Petition for Writ of Certiorari .. 1

Statement of the Case 1

Augument: Why Certiorari should not be granted .. 7

Conclusion 8

TABLE OF AUTHORITIES

Page

Cases

Ennis Water Works v. Ennis, 233 U.S. 652, 58 L.Ed. 1139, 34 S. Ct. 767 (1914) 7

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 42 U.S. 304, 96 L.Ed. 2d 250, 107 S. Ct. 52 (1987) 7, 8

St. Louis, I.M. and S.R. Co. v. Taylor, 210 U.S. 281, 52 L.Ed. 1061, 28 S. Ct. 616 (1908) 7

Rules and Statutes

Rule 59 6

28 U.S.C. § 1257 7

42 U.S.C. Section 1983 7

O.C.G.A. Section 9-5-1 1

O.C.G.A. Section 9-11-65(a)(2) 2

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STATEMENT OF THE CASE

Respondent, Fayette County filed the original action [Case No. 44164] in the Fayette County Superior Court against Julius E. Cruse pursuant to O.C.G.A. Section 9-5-1, seeking an injunction to restrain Petitioner from further expanding his business facility. Respondent, Fayette County contended that the Petitioner was operating this business in violation of the current zoning ordinance of Fayette County and had also violated the flood damage prevention ordinance. Petitioner answered, filed a cross claim, and asked the Superior Court to declare the 1980 zoning ordinance and the 1984 amendment thereto

void. Further, Petitioner sought a mandamus and injunction against the County.

Pursuant to O.C.G.A. Section 9-11-65(a)(2), the County's application for interlocutory injunction and the trial on the merits were consolidated. The hearing was held before the Superior Court of Fayette County on December 16, 1985.

The Petitioner owned 38.3 acres of land located in Land Lot 174, 7th District of Fayette County, and on upon which a business has been operated since 1967. (T-184). At its inception, the business was an outdoor amusement facility consisting primarily of a golf course, golf driving range, go-carts, swimming, and pony rides. (T-184). Approximately 1967 or 1968, six to eight campsites were set up for recreational campers on an overnight rental basis. On February 11, 1967, after public hearing, the Board of Commissioners of Fayette County granted a request by Petitioner that his land be rezoned "C-4, General Commercial District (T-184) pursuant to the 1960 Zoning Ordinance of Fayette County. Specifically, Cruse had sought a conditional use permit for item 10 enumerated under the C-4 classification. Said item allowed "outdoor amusement enterprises, including pony riding ring (without stables), miniature golf course, golf driving range, carnivals and bazaars (need not be enclosed)." (T-183, page 21 of 1960 Zoning Ordinance of Fayette County). The Petitioner's property was thereby rezoned and a conditional use permit for C-4 (10) was granted on March 7, 1967. (T-184). Included under the C-4 conditional use was item 14, which permitted "trailer camps which comply with the requirements of the resolution of Fayette County pertaining motels, tourist homes, and

trailer camps (need not be enclosed)." (T-181). The Petitioner had not requested his property be zoned for C-4 (14) and his permitted uses were confined to those enumerated under C-4 (10).

On November 13, 1980, Fayette County adopted a new Zoning Ordinance and a new Zoning Map whereby the Petitioner's property was classified A-R (agricultural-residential). Under the A-R classification "outdoor commercial amusement or recreational activity" became a permitted use. (T-34, page 56, 1980 Fayette County Zoning Ordinance). Subsequently, "Ordinance number 84-01" (T-219), was adopted by the Board of Commissioners of Fayette County on January 26, 1984. Notice of the public hearing to be held on January 26, 1984 before the Board of Commissioners of Fayette County was published in the "Fayette County News", the legal organ of Fayette County on January 18, 1984, and January 25, 1984 (T-220).

Pursuant to the 1984 Zoning Ordinance Amendment, several permitted uses were removed from the A-R (agricultural-residential) classification among the permitted uses removed was "outdoor commercial amusement or recreational activity. No changes were made in the Zoning Map concerning Petitioner's property after the 1984 amendment and the current Zoning Map indicated that Petitioner's property remained A-R. As the vast majority of Fayette County is rural property and zoned A-R (agricultural-residential) no zoning classification of A-R is actually written on the current Zoning Map for Petitioner's property. Fayette County's procedure is that all tracts of land, unless otherwise noted on said map are zoned A-R. The only notice to the Petitioner of the change in the use of Zoning of his property by the 1984 Zoning

Amendment was the legal advertisement in the "Fayette County News."

From the evidence introduced at trial, it appears that the overall focus of Petitioner's business changed in 1979 and the name became Camper's Paradise. (T-129). The amusement activities were phased out as was the golf course in 1980. The Petitioner developed his business for overnight trade. He expanded the overnight facilities and trailer pads were added and hook up accommodations for overnight vehicles were installed.

By 1980 permanent residents were living at Campers Paradise. (T-130). Trailers were underpinned and used as permanent dwellings. Occupants of the trailers were listed in the telephone directory showing Camper's Paradise as their address. (T-62). Children at the facility began attending public schools in Fayette County. (T-141). The school bus driver, Nita Barge, who testified at the hearing stated that she had transported as few as one and as many as twelve students between the fall of 1980 and the date of the hearing before the Superior Court of Fayette County. (T-142). Four students were transported for a period of two school terms. (T-142).

On June 19, 1979, a business license was issued to Camper's Paradise by Fayette County for "campgrounds". (T-225). At no time since Petitioner's business began had it been licensed or zoned to operate a camp for trailers or mobile homes which could be used for permanent dwellings or residential purposes.

In 1982, Petitioner employed Rudolph M. Parks to assist with engineering and drainage plans as well as the general development of his property. In 1983, grading,

landscaping, and additional roads and trailer pads were constructed. In June of 1984, further expansion was instituted with construction of 20 new trailer pads. Lights, water, sewage connections were installed. From 1980 to the present, no permits were issued to or applied for by the Petitioner or contractors performing work on his behalf, except for one permit on July 1, 1985, to replace an electrical pole. (T-110-115).

Further, in May, 1985 the Petitioner moved dirt interfering with the flood plain without a permit. (T-81).

Petitioner was issued two stop work notices by Fayette County, one on September 11, 1984, and one on July 30, 1985. The 1985 notice was for "illegal expansion of non-conforming use, an addition of non-conforming use, violations of sign ordinance, and violations of the flood control ordinance. (T-188).

In February, 1985, Petitioner requested his property be rezoned from A-R to C-C (community commercial), which would allow them as a permitted use "outdoor commercial amusement or recreational facility". The request was denied by the Board of Commissioners of Fayette County on March 28, 1985 and Petitioner did not appeal this decision. (T-186).

Whereafter, Fayette County instituted proceedings against the Petitioner to enjoin the continued expansion of Petitioner's property.

On April 25, 1986, the Superior Court of Fayette County issued an Order whereby it was determined that Petitioner was using his property as a mobile home park and as such it became an illegal non-conforming use. The

Court further determined that the 1984 amendment of removing "outdoor commercial amusement or recreational activity" had not been properly advertised nor had Petitioner's property been posted. Therefore, the Court found that the 1984 amendment had not been properly adopted and allowed the County 60 days from the date of the order in which to readopt the 1984 Zoning Amendment in such a manner as would pass constitutional muster. (R-115-116).

After a request for an extension of time in which to accomplish this, (R-127) the Board of Commissioners of Fayette County did on June 26, 1986 adopt a new amendment to the Zoning Ordinance. (R-128-135).

On July 3, 1986 this information was transmitted to the Superior Court of Fayette County stating that in the course of adopting said ordinance over 100 parcels of A-R (agricultural-residential) property within Fayette County, including that of the Petitioner, had been posted. (R-128). On September 26, 1986 the Superior Court of Fayette County under an Order determining that the County had complied with the directives of the Court's Order of April 25, 1986. (R-168).

Petitioner's notice of appeal to the Supreme Court of Georgia then followed.

On February 17, 1987, the Court issued an Order affirming the judgment of the Trial Court without opinion pursuant to Rule 59. Thereafter, Fayette County instituted another action of an injunction seeking to have the Petitioner's business of operating an overnight camping operation with the use of trailers or other recreational vehicles enjoined. On August 23, 1988 a hearing was held

before the Honorable Ben J. Miller, Fayette County Superior Court. (See transcript). Issued a ruling granting the County's request for a permanent injunction against the Petitioner's use of the property that violated in portion of Section 6-24 of the Zoning Ordinance of Fayette County as it was amended as of August 28, 1986. Further, the Trial Court dismissed Petitioner's counterclaim alleging the constitutional tort under 42 U.S.C. Section 1983. Further, the Court denied Petitioner's request for a declaratory judgment seeking to have the Court declare that he had a vested right for the use of overnight camping.

An appeal thereafter followed to the Georgia Supreme Court which again affirmed the Trial Court on February 8, 1989.

ARGUMENT: WHY CERTIORARI SHOULD NOT BE GRANTED

Petitioner has failed to present a substantial Federal question in the case.

The Supreme Court's jurisdiction to review a State Court decision under 28 U.S.C. §1257, whether by appeal or by certiorari, is dependent upon the presence of a Federal question in the case. *St. Louis, I.M. and S.R. Co. v. Taylor,* 210 U.S. 281, 52 L.Ed. 1061, 28 S. Ct. 616 (1908). A Federal question is not substantial if it is plainly without foundation or merit. *Ennis Water Works v. Ennis,* 233 U.S. 652, 58 L.Ed. 1139, 34 S. Ct. 767 (1914).

Petitioner has attempted to argue that the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 42 U.S. 304, 96 L.Ed. 2d

250, 107 S. Ct. 52 (1987) applies in that he attempts to allege that the petitioner is being denied the business use of his property. It is first necessary to note that the case relied on upon by the Petitioner concerned property wherein all use of the property was prohibited by the County government. In the present action the petitioner would only be limited to those uses allowed in the (A-R Agricultural-Residential Zoning District of Fayette County, Georgia). However, under said District, petitioner still allowed several uses of the property including commercial uses. Therefore, the factual situation as presented in the present case does not coincide with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, id.*, and therefore there is no substantial Federal question presented to this Court.

CONCLUSION

Respondent prays that certiorari not be granted to review said issues as there is presented no substantial Federal question to this Court.

Respectfully submitted,

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